equitable relief, where proper as between the parties, very much as a matter of course,[27] and without inquisition into the merits and demerits of the transactions through which the plaintiff derives his rights.[28] Thus, where title to public land had been granted to the defendant under misinterpretation of a statute, a state court imposed upon him a constructive trust in favor of the plaintiff whose claim, though superior to that of the defendant, was secured from their common grantor by fraud.[29] At about the same time, however, a federal court denied protection to an infant who had repudiated her professional contract as against the co-contractor who was using the defunct contract to hinder the infant plaintiff from securing employment elsewhere.[30] It will scarcely be urged that the policy against infants repudiating their agreements is stronger than against grantees securing property rights by fraud. One is forced to the conclusion that in the case of the infant, the judge laid hold of the maxim, as a means to punish the plaintiff — a function which equity did not assume even in the days when the Chancellor, as an ecclesiastic, might have been pardoned for more strenuous insistence upon his tribunal as a "court of conscience."[31]

RESCISSION OF A CONTRACT FOR A MUTUAL MISTAKE OF FACT. — "To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract, has been apparently well nigh the despair of law writers." [1] If text writers and court are unable to agree even on what a mistake is,[2] such confusion and uncer-

between the parties A and B is illegal and unenforceable, yet if A in pursuance of it transfers property to a third person in trust for B, B may recover the property. Tenant *v.* Elliott, 1 Bos. & P. 3 (1797); Farmer *v.* Russell, 1 Bos. & P. 296 (1798); Worthington *v.* Curtis, L. R. 1 Ch. Div. 419 (1875). See also Sharp *v.* Taylor, 2 Phill. Ch. 801 (1848), criticized, however, in Sykes *v.* Beadon, L. R. 11 Ch. Div. 170, (1879). It is generally held that as agent must account for money received in his principal's illegal business. Baldwin *v.* Potter, 46 Vt. 402 (1874); Planters' Bank *v.* Union Bank, 16 Wall. (U. S.) 483 (1872); Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140 (1863); Wilson *v.* Owen, 30 Mich. 474 (1874). For a discussion and criticism of these cases, see 3 WILLISTON, CONTRACTS, §§ 1785-1786.

[2,7] See F. Pollock, "The Expansion of The Common Law," 4 COL. L. REV. 12, 27.

[8] American Ass'n, Ltd. *v.* Innis, 109 Ky. 595, 60 S. W. 388 (1901); Cochran Timber Co. *v.* Fisher, 190 Mich. 478, 157 N. W. 282 (1916); Warfield *v.* Adams, 215 Mass. 506, 102 N. E. 706 (1913); Ely *v.* King-Richardson Co., 265 Ill. 148, 106 N. E. 619 (1914); Langley *v.* Devlin, *supra*, n. 11; Mo. Fidelity & Casualty Co. *v.* Art Metal Const. Co., 242 Fed. 630 (8th Circ. 1917).

[29] Everett *v.* Wallin, 184 N. W. 958 (Minn. 1921). For the facts of this case see RECENT CASES, *infra*, p. 774.

[30] Carmen *v.* Fox Film Corp., 269 Fed. 928 (2nd Circ., 1920). See 30 YALE L. J. 522.

[31] In Ward *v.* Lant, Prec. Ch. 182, 183 (1701) there is a *dictum* that where a person has executed a voluntary deed "to screen himself from taxes" he may nevertheless have relief concerning it in equity.

"This court is not a Court of Conscience," — per Buckley, J., in *In re* Telescriptor Syndicate, (1903) 2 Ch. 174, 195.

[1] *Per* Dodge, J., in Kowalke *v.* Milwaukee Electric Lt. & Ry. Co., 103 Wis. 472, 473, 79 N. W. 762, 763 (1899). See W. W. Kerr, "The Equitable Doctrine as to Mistake," 3 JURID. SOC. PAP. 173; Roland R. Foulke, "Mistake in the Formation and Performance of Contracts," 11 COL. L. REV. 197.

[2] Thus mistake as "some unintentional act, or omission or error," as defined by Mr. Justice Story in his EQUITY JURISPRUDENCE, 14 ed., § 156, is criticized by Mr. Pomeroy as a description of the effects of mistake, or the consequences arising therefrom,

tainty as to its legal consequences are to be expected. The situation is aggravated by a failure to realize that results under the subjective theory of contracts, where great importance is placed upon the meeting of the minds of the parties, will be materially different from results under the objective theory, which emphasizes their expressions.[3] Further confusion arises when mutual misunderstandings,[4] where there is no contract at all — since both parties are justified in reasonably construing the offer to refer to a different matter — are classified as cases of mutual mistakes of fact; or when no distinction is drawn between the cases where the mistake is set up as a defense to a suit for specific performance,[5] and as a ground for rescinding the whole transaction.

Suppose there has been an expression of agreement, and the agreement does conform to the intention of the parties,[6] but both parties have made a mistake as to the way their agreement would apply to existing facts.[7] In such a case when will relief be given?[8] While numerous tests[9] have been laid down to guide the courts, there seem to be two generally recognized theories of which various other suggestions are

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rather than its essential features, which he regards as "an erroneous conviction, — a mental condition." See 2 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 839; 3 WILLISTON, CONTRACTS, § 1535; Roland R. Foulke, *op. cit.*, 199.

[3] Under the subjective theory any material mistake would be fatal unless an estoppel were made out. See 3 WILLISTON, CONTRACTS, § 1546. Consequently the Civil Law was liberal in its relief. See CLARK, EQUITY, § 370; POUND, READINGS IN ROMAN LAW, 2 ed., 39.

[4] Raffles *v.* Wichelaus, 2 H. & C. 906 (1864); Crowe *v.* Lewin, 95 N. Y. 423 (1884). See CLARK, EQUITY, § 370; 1 WILLISTON, CONTRACTS, §§ 20, 94, 95a. A situation where A is mistaken as to a fact, and B is not; but B is mistaken in that he erroneously believes that A is not mistaken as to that fact, is a case of two different mistakes but not a mutual mistake. For a clear analysis of just what the nature of a mutual mistake is, see Edwin H. Abbot, Jr., "Mistake of Fact As a Ground For Affirmative Equitable Relief," 23 HARV. L. REV. 608.

[5] The remedy of specific performance is said to be discretionary. Hess *v.* Bowen, 241 Fed. 659 (8th Circ., 1917). A mistake which will justify a denial of specific performance need not be as strong as that requisite for rescission, which has the effect of doing away with the entire bargain. Thus a unilateral mistake has not infrequently been held sufficient excuse for the court's denial of specific performance. Rushton *v.* Thompson, 35 Fed. 635 (D. Neb., 1888); Mansfield *v.* Sherman, 81 Me. 365, 17 Atl. 300 (1889). See CLARK, EQUITY, § 356; 3 WILLISTON, CONTRACTS, §§ 1427, 1542. But see *contra*, 2 ILL. L. REV. 267.

[6] Where the written agreement does not correctly express the agreement of the parties the remedy is reformation. Philippine Sugar Co. *v.* Govt. of the Philippine Is., 247 U. S. 385 (1917); Gaylord *v.* Pelland, 169 Mass. 356, 47 N. E. 1019 (1897).

The quantum of error necessary for reformation as in defense to specific performance need not be so great as for rescission, as the parties are still left with a contract. See note 5, *supra*.

[7] For a discussion of the legal consequences of a mistake of law, which is beyond the scope of this note, see 3 WILLISTON, CONTRACTS, § 1581; 2 POMEROY, EQ. JUR. 4 ed., § 840; CLARK, EQUITY, § 370. See also 38 AM. L. REG. 89; 14 VA. L. REG. 136. As to when rescission will be allowed for a unilateral mistake see Roland R. Foulke, *op. cit.*, 197, 224; 3 WILLISTON, *op. cit.*, § 1573.

[8] The Statute of Frauds interposes no obstacle to the remedy of rescission. Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138 (1889).

[9] For an able discussion of the question of error and the basic fact test, although the writer gives it a questionable terminology, see Edwin H. Abbot, Jr., *op. cit.*, 23 HARV. L. REV. 608. See also a rather ingenious but hardly tenable analysis, L. L. Leonard, "An Analysis of the Law of Mistake of Fact As Applied in the Avoidance of Contracts," 64 ALB. L. J. 148. And see 3 CORNELL L. Q. 142; 2 POMEROY, *op. cit.*, § 856.

merely ramifications: (1) the identity of subject matter test; and (2) the basic fact test.[10]

A common instance where under either test relief will always be granted is where there is a mistake as to the existence of the subject matter of the bargain,[11] — unless the parties bargain for a risk.[12] On the other hand, in case of speculative contracts [13] courts should never interfere in the absence of special circumstances. Thus in transactions on the exchange or where there is a compromise settlement [14] the parties are dealing with their eyes open, and with a view either to taking a risk

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[10] The German Civil Code provides: "If the declarant was at the time of the declaration (of will) mistaken as to the substance of the same or did not at all intend to make such a declaration he may contest the same, when it is to be assumed that he would not have made it, had he known the facts and had he considered the matter advisedly. A mistake relating to such qualities of persons or things, which in ordinary dealings are considered material, shall be regarded as a mistake as to the substance of the declaration." See GERM. CIV. CODE, § 119. This section is sometimes quoted as "not greatly differing" from the basic fact test. See 3 WILLISTON, CONTRACTS, § 1546. It is submitted that this position might be questioned. The first part of this section is beyond that to which most Anglo-American courts would go, as we do not have the policy of the Civil Law that the declarant, if he is to be given relief, must compensate the one who relies upon his declaration. See GERM. CIV. CODE, § 122. On the other hand, the last part of section 119 would limit the relief to cases where the subject matter was affected, which is a doctrine narrower than the one here advocated but broader than the old test of identity.

An illustration will bring out the distinctions. (1) A and B contract for the sale of a certain shipload of sugar. The ship, unknown to the parties, has been sunk and the sugar destroyed at the time the bargain was made. Relief would be given under the identity test, the German Code and the basic fact test. See note 11, *infra*. (2) If the sugar were in existence, but only badly spoiled, at the time of the bargain, or of a much inferior quality, there should be no relief under the identity test. See note 24, *infra*. But there would be ground for relief under either of the other two theories. See note 27, *infra*. (3) If the sugar is in existence and the quality as agreed, but the parties had taken as the fundamental basis of their agreement that the government had fixed the price at a certain point, and had contracted on that assumption, and that assumption was erroneous, then relief could be given only under the basic fact test.

[11] Hastie *v.* Couturier, 9 Exch. 102 (1853); Clifford *v.* Watts, L. R. 5 C. P. 577 (1870); Scott *v.* Coulson, [1903] 2 Ch. 249; Gibson *v.* Pelkie, 37 Mich. 380 (1877); Reigel *v.* American Life Ins. Co., 140 Pa. 193, 21 Atl. 392 (1891).

The decision in Scott *v.* Coulson, *supra*, has been criticized on the ground that the mistake was only collateral and did not go to identity — the subject matter being an insurance policy (held by the beneficiary) and the mistake being as to the existence of the insured. See 47 SOL. J. 313. The general principle, however, is quite well established. See ANSON, *op. cit.*, § 187; 3 WILLISTON, CONTRACTS, § 1561; UNIFORM SALES ACT, §§ 7, 8.

There is an analogy between the defense of mistake and the misnamed defense of impossibility. In their essential nature they are both the same. In the one case the mistake is as to an existing subject matter, or means of performance, or a fact which the parties take as the fundamental basis of their agreement; and in the other, it is as to the future existence of the subject matter or means of performance. See 3 WILLISTON, *op. cit.*, § 1937.

[12] Butte *v.* Thompson, 13 M. & W. 487 (1844); Lehigh Zinc & Iron Co. *v.* Bamford, 150 U. S. 665 (1893); Valley City Milling Co. *v.* Prange, 123 Mich. 211, 81 N. W. 1074 (1900). In case of doubt the court favors a construction not imposing a risk. Virginia Iron Co. *v.* Graham, 124 Va. 692, 98 S. E. 659 (1919).

[13] In the absence of fraud or bad faith no relief will be granted on the ground of mistake in speculative contracts. Jefferys *v.* Fairs, L. R. 4 Ch. Div. 448 (1876); Bell *v.* Lawrence's Admns., 51 Ala. 160 (1874); Chicago & N. W. Ry. Co. *v.* Wilcox, 116 Fed. 913 (8th Circ., 1902). See 2 POMEROY, EQ. JUR. 4 ed., § 855.

[14] Sears *v.* Leland, 145 Mass. 277 (1887). In these cases the parties make a settle-

or closing up the matter. For a court here to go into the question of error would be unwise and contrary to business understanding.

It is the intermediate class of cases which raises the difficulty. Under the first test the mistake of the parties is no ground for relief unless the identity of the subject matter is so affected that what the parties are getting is not the *thing* for which they bargained. Accordingly, courts acting on this basis have denied relief to a purchaser of a note from a broker, where unknown to the parties the maker had already made an assignment for the benefit of his creditors;[15] and to the seller of a rough diamond which the parties had mistakenly thought to be a "stone."[16] And a settlement by a woman under the erroneous idea that she was not pregnant was not set aside when she was found to be with child.[17] Under this identity test it is difficult to support the classical case of *Sherwood* v. *Walker*,[18] where parties contracted to buy and sell a cow thinking her barren and relief was granted when she was found to be otherwise. Similarly, the intervention of the courts where land is found to be without timber [19] or ore [20] contrary to the expectations and belief of the parties; or the setting aside of a conveyance where the parties were under the mutually mistaken belief that the county seat had been moved;[21] or the granting of relief in those cases where there was some error in the means or measure on which the parties relied to determine the quantity, quality, or value of the subject matter of their bargain,[22] seems inconsistent with the identity test. The holding of a recent Washington case [23] that the buyer of a large number of shares of stock in a bank could rescind on the ground that the transaction had been entered

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ment of a claim, the validity of which depends on a fact unknown to them. This is not a case of mistake at all, — but conscious ignorance. The case of Kowalke *v.* Milwaukee Elect. Lt. & Ry. Co., *supra*, might be explained on this ground. See ANSON, *op. cit.*, § 187, note 1.

[15] Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651 (1888); Bicknall *v.* Waterman, 5 R. I. 43 (1857); Dambmann *v.* Schulting, 75 N. Y. 55 (1878).

[16] Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42 (1885).

[17] Kowalke *v.* Milwaukee Electric Light & Ry. Co., 103 Wis. 472, 79 N. W. 762 (1899).

[18] 66 Mich. 568, 33 N. W. 919 (1887).

[19] Thwing *v.* Hall Lbr. Co., 40 Minn. 184, 41 N. W. 815 (1889); Blygh *v.* Samson, 137 Pa. 368, 20 Atl. 996 (1891).

[20] Dale *v.* Roosevelt, 5 Johns. Ch. (N. Y.) 174 (1821).

[21] Griffith *v.* Sebastian Co., 49 Ark. 24, 3 S. W. 886 (1887).

[22] Relief was granted where a survey was made the basis of the bargain. McMahan *v.* Terkhorn, 116 N. E. 327 (Ind. 1917); Gilroy *v.* Alis, 22 Ia. 174 (1867); Coon *v.* Smith, 29 N. Y. 392 (1864); so also appraisement, Freeman *v.* Jeffries, L. R. 4 Ex. 189 (1869); inventory, Spaulding *v.* American Wood Board Co., 26 Hun. (N. Y.) 237 (1898); or assay, Cox *v.* Prentice, 3 M. & S. 344 (1815).

[23] Lindeberg *v.* Murray, 201 Pac. 759, (Wash. 1921). For the facts of this case, see RECENT CASES, *infra*, p. 765.

It is easier to support the result in this case on the construction of the contract held by the dissenting judges than under that of the majority. Under the dissenting view that the contracts were dependent, the rescission of the contract between the two banks would clearly have been a ground for relieving the plaintiff from his contract dependent thereon. Whereas, under the construction given to the transaction by the majority of the court, that the contract between the plaintiff and the defendant was separate and not dependent on the contract between the two banks, rescission by the plaintiff would be permitted only if the fundamental basis of the contract was that the corporation assets were as the books indicated them to be.

into under a mutual mistake as to the assets of the corporation, not only flies in the face of the supposedly accepted note case of *Hecht* v. *Batcheller*,[24] but is also contrary to a square decision on similar facts in an earlier Minnesota case.[25] All these cases may, however, be explained on the basic fact test, *viz.*, that "where the parties assumed a certain state of facts to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if that assumption (which was made by them the fundamental basis of their agreement) was erroneous." [26] In all these intermediate cases the parties have received the *thing* for which they bargained. There is no question of identity of subject matter. The error goes clearly to a fact which may be called collateral, or extrinsic;[27] but since that fact was taken by the parties as the fundamental basis of their agreement relief should be granted.

The attempt to reduce the question to a hard and fast rule of identity of subject matter, while it has the advantage of ease of application, has not worked out in practice; and the injustice its strict application would cause in some cases has led to ingenious but unsubstantial distinctions.[28] Whether the basis for the relief granted by the courts is the general feeling that a person should not be compelled to give up his property for much less than it is really worth, and that is inequitable for the other party to retain the fruits of an honest error;[29] or that there is a substantial failure of consideration, in that one party because of a mistake going to the essence is not really getting what the parties thought he was going to receive;[30] or that where both parties, though literally agreeing to the terms of the bargain, are grossly unaware of the actual facts, for the law to hold them to their obligations would be perpetrating an injustice almost as great as though they had never really assented to its terms—in any case the law is protecting an individual from the loss of his property through a transaction based on a fundamental assumption which is discovered to have been erroneous. The basic fact test seems to be sound. True, the rule is not easy of application; but it is the one which best carries out the intention of the parties, the understanding of merchants, and the interests of justice.

RECENT CASES

ADMINISTRATIVE LAW — JUDICIAL REVIEW — CONCLUSIVENESS OF FINDINGS OF FACT BY WORKMEN'S COMPENSATION COMMISSION UNDER DUE PROCESS CLAUSE. — In a proceeding under a Workmen's Compensation Act, the defense

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[24] 147 Mass. 335, 17 N. E. 651 (1888). See note 15, *supra*.

Sample *v.* Bridgforth, 72 Miss. 293, 16 So. 876 (1894); Kennedy *v.* Panama Mail Co., L. R. 2 Q. B. 580 (1867). See Roland R. Foulke, *op. cit.*, 197; STORY, *op. cit.*, § 219.

[25] Costello *v.* Sykes, 143 Minn. 109, 172 N. W. 907 (1919). But see St. Nicholas Church *v.* Kropp, 135 Minn. 115, 160 N. W. 500 (1916), where relief was given from a unilateral mistake of same kind.

[26] See 3 WILLISTON, CONTRACTS, § 1544.

[27] See ANSON, CONTRACTS, Corbin's ed., §187, note 1; CLARK, EQUITY, § 356.

[28] See Cotter *v.* Luckie, 1918 N. Zeal. L. R. 811; Gardner *v.* Lane, 12 Allen (Mass.) 39 (1866). And also 3 WILLISTON, CONTRACTS, § 1569.

[29] See Roland R. Foulke, *op. cit.*, 223; W. W. Kerr, *op. cit.*, 3 JURID. SOC. PAP. 173.

[30] See 3 WILLISTON, CONTRACTS, § 1544; 38 AM. L. REV. 334, 346.